No. 683

IN THE

UNITED STATES SUPREME COURT

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of CLARENCE Y. HOPE, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

M. L. BELL,
New York, New York,

W. F. DICKINSON,
DANIEL TAYLOR,
Chicago, Illinois,

THOMAS D. O'BRIEN,
EDWARD S. STRINGER,
St. Paul, Minnesota,
Counsel for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation organized under the laws of the states of Illinois and Iowa, respectfully presents to this court its petition for a writ of certiorari, addressed to the Supreme Court of the State of Minnesota, commanding said

court and the clerk thereof to certify to this court the record and proceedings of the case in said court, wherein your petitioner was appellant and defendant, and A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, was plaintiff and respondent, for a review and determination of said cause by this court.

On June 30, 1925, the said Supreme Court of Minnesota did enter its judgment, whereby it did affirm a judgment of the District Court of Steele County, Minnesota, in favor of plaintiff-respondent, A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, and against the defendant, your petitioner, for the sum of $26,931.72. Said judgment was and is the final judgment of said Supreme Court of Minnesota in said cause, and said Supreme Court of the State of Minnesota was and is the highest court of law and equity in which a decision could be had in said cause. In said cause your petitioner especially set up and claimed a right, under the Constitution of the United States, to-wit: Under Section 1, of Article IV thereof, and the decision of the Supreme Court of the State of Minnesota was against the right so especially set up and claimed by your petitioner.

This action was brought by the plaintiff for damages under the Federal Employers' Liability Act of April 22, 1908. Hope's widow, Jessie Hope, was his sole and only dependent. The sole question at issue in the case was whether Hope, at the time of his death, was engaged in interstate com-

merce, and hence, under the Federal Employers' Liability Act, or engaged only in intrastate commerce, and hence, under the Compensation Act of the State of Iowa where said accident occurred. Concededly if engaged in intrastate commerce, there could be no recovery in this action.

After the commencement of this action but prior to its trial, your petitioner, claiming that any cause of action existing for the death of decedent was governed by the Compensation Act of the State of Iowa, filed its petition with the Industrial Commissioner of Iowa, asking for an adjudication of the matter under that act. Jessie Hope, the widow of said decedent and his only dependent under the Federal Employers' Liability Act, if a cause of action existed under that act, duly appeared in said proceeding, asserting that the decedent was at the time of his death, engaged in interstate commerce. A decision was duly rendered by the Arbitration Committee, holding specifically that said decedent was engaged in intrastate commerce only. Said Jessie Hope filed an application for review by the Industrial Commissioner, who affirmed the decision of the Arbitration Committee, from which decision said Jessie Hope appealed to the District Court of Lucas County, Iowa, which court (the same being a court of record of the state of Iowa), on June 2, 1923, entered its final judgment, which remains unreversed, specifically adjudging that the decedent was engaged in intrastate commerce at the time of his death.

Thereafter, and on March 4, 1924, this action (under the Federal Employers' Liability Act) was tried. Your petitioner offered in evidence an exemplified copy of the judgment of the District Court of Lucas County, Iowa, by which it was adjudged that the decedent was engaged in intrastate commerce, only.

The District Court of Steele County refused to receive said judgment of the Iowa court in evidence, and refused to direct a verdict in favor of the defendant, your petitioner, made upon the ground that it was conclusively established by said Iowa judgment that decedent was engaged in intrastate commerce. Said court submitted the character of the commerce to the jury, who found as a fact that it was interstate. The court denied a motion for judgment notwithstanding the verdict or for a new trial, made upon the same grounds. Judgment was entered in favor of plaintiff, and upon appeal, the final judgment of the Supreme Court of Minnesota affirmed the lower court. The opinion is reported in Schendel vs. Chicago, R. I. & P. Ry. Co., 204 N. W. 552. (R. 210-228.)

THE DISTRICT COURT OF LUCAS COUNTY, IOWA, ENTERED A JUDGMENT DECREEING THAT DECEDENT WAS ENGAGED IN INTRASTATE COMMERCE.

THE DISTRICT COURT OF STEELE COUNTY, MINNESOTA, REFUSED TO BE BOUND BY THE IOWA JUDGMENT AND HELD DIRECTLY THE CONTRARY, AND THE SUPREME COURT OF MINNESOTA SUSTAINED IT IN SO DOING.

THE SUPREME COURT OF MINNESOTA ERRED IN AFFIRMING THE DISTRICT COURT OF STEELE COUNTY, MINNESOTA, IN REFUSING TO GIVE FULL FAITH AND CREDIT TO A JUDGMENT OF A COURT OF RECORD, OF THE STATE OF IOWA, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE CONSTITUTION OF THE UNITED STATES.

The reasons for the decision of the Supreme Court of Minnesota were, in brief, as follows:

1. That the judgment of the District Court of Lucas County, Iowa, was not binding because:

> "Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he can not, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act." (R. 224.)

2. That there was no identity of parties in the two actions, the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the Federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such sole beneficiary for the purpose of suit).

Both questions decided by the Supreme Court of the State of Minnesota were Federal questions

of substance, neither of which has heretofore been specifically determined by this court, and the Supreme Court of the State of Minnesota decided such Federal questions in a way not in accord with such decisions of this court as bear upon the questions.

The first question decided by the Supreme Court of the state of Minnesota has been decided by two other courts only, and both contrary to the decision of the Minnesota Supreme Court. See the California decision, *Williams v. Southern Pacific Ry. Co.* 202 Pac. 356, 54 Cal. App. 571, and the decision of the Circuit Court of Appeals of the Second Circuit, *Dennison v. Payne*, 293 Fed. 333. The opinion in the *Williams* case was written by the District Court of Appeals of California, but the Supreme Court of the State of California, on December 15, 1921, adopted it by refusing a hearing, and this court denied a writ of certiorari to the Supreme Court of California, but upon the ground that there was no final judgment. See 258 U. S. 622.

Upon the second proposition (identity of parties), there is a direct conflict between the *Williams* case and the *Dennison* case, the *Williams* case holding that there is such identity of parties, and the *Dennison* case holding the contrary.

Your petitioner is advised that said final judgment of the Supreme Court of the State of Minnesota is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination for the reasons herein-

before stated and for the reasons stated in the accompanying brief.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Supreme Court of the State of Minnesota, and the opinion of said court.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the Supreme Court of the State of Minnesota, sitting at St. Paul, Minnesota, commanding the court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Minnesota had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the said judgment of the Supreme Court of the State of Minnesota be reviewed by this Honorable Court, and for such further relief as may seem proper, and your petitioner will forever pray.

M. L. BELL,
New York, New York,

W. F. DICKINSON,
DANIEL TAYLOR,
Chicago, Illinois,

THOMAS D. O'BRIEN,
EDWARD S. STRINGER,
St. Paul, Minnesota,
Counsel for Petitioner.

STATE OF MINNESOTA,

County of Ramsey, ss.

EDWARD S. STRINGER, being duly sworn, deposes and says that he is one of the counsel for petitioner, Chicago, Rock Island & Pacific Railway Company. That he has read the foregoing annexed petition and knows the contents thereof. That he has carefully read and studied the duly certified copy of the transcript of the record which accompanies the petition herein, being a transcript of the record in the case at bar. That the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and he knows of the above proceedings had and that the matters in said petition herein stated are true to the best of his knowledge and belief.

EDWARD S. STRINGER.

Subscribed and sworn to before me this 15th day of August, A. D. 1925.

M. A. HAYES,
Notary Public,
Ramsey County, Minnesota.

My commission expires November 26, 1927.
(Notarial Seal)

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and, in my opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

EDWARD S. STRINGER,
Counsel for Petitioner.

(31,406)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 683.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of CLARENCE Y. HOPE, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

M. L. BELL,
New York, New York,
W. F. DICKINSON,
DANIEL TAYLOR,
Chicago, Illinois,
THOMAS D. O'BRIEN,
ALEXANDER E. HORN,
EDWARD S. STRINGER,
St. Paul, Minnesota,
Counsel for Petitioner.

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Respondent.

PETITIONER'S REPLY BRIEF.

B.

JURISDICTION OF IOWA INDUSTRIAL COMMISSIONER AND IOWA COURT ON APPEAL.

Many pages are devoted by respondent to the proposition that the Federal Employers' Liability Act is supreme as to interstate commerce, and that

a state cannot now legislate with respect to it. After the many decisions of this court, such elaborate citation of authorities on this proposition should be unnecessary. However, such rule is wholly foreign to this discussion, as it is quite a different proposition from holding that a state can establish a tribunal with jurisdiction to determine whether commerce is interstate, or intrastate. For such tribunal so to determine a fact, is not interfering in any way with interstate commerce. It is merely determining whether or not interstate commerce exists. Of course if such tribunal reaches a wrong conclusion, it is subject to review by direct appellate procedure, as interstate commerce is a federal question, but even in the event a state tribunal should decide, as many courts did decide before this court spoke, that the rights of employees in interstate commerce could be limited by state legislation, that decision of the state tribunal, although in fact erroneous, would be final and conclusive if not set aside by direct review.

Respondent's brief, page 55, contains this statement with respect to the jurisdiction of the Iowa Industrial Commissioner:

> "From the moment the Federal right was asserted, *the Commission was without power, rigth or authority to continue with the case.*"

Let us see where such proposition would lead us as a practical matter if followed to its logical conclusion.

Suppose a railway employee is hurt in Iowa under circumstances involving no negligence on the

part of his employer. He claims that he was engaged in intrastate commerce, and entitled to an award under the state Compensation Act. His employer, however, asserts that he was employed in interstate commerce, and hence under the Federal Employers' Liability Act, and since there was no negligence, is entitled to nothing. Obviously there must be some tribunal with jurisdiction to determine the issue. The injured man files his petition with the Industrial Commissioner alleging intrastate commerce. The railway company answers with the allegation that the commerce was interstate.

With the pleadings in this condition, what is the injured man's remedy? Respondent's proposition is:

> "From the moment the Federal right was asserted, *the Commission was without power, right or authority to continue with the case.*"

If this proposition is sound, the Industrial Commissioner must on the mere allegation of interstate commerce, cease to function and cannot determine the only issue tendered. The only other possible remedy for the injured man is an action under the Federal Employers' Liability Act, and he must, if respondent's contention is correct, begin an action under that act, and assert (what he in fact claims is not true) that he was injured in interstate commerce, and since he cannot truthfully allege negligence, he must fail on the face of his pleading. In other words, under respondent's

theory, the man is deprived of any hearing whatever.

But assume that the Industrial Commissioner violates what respondent claims is the law, proceeds to determine the issue of the character of the commerce, decides that it is intrastate, and makes his award accordingly. The railway company can of course appeal, but under respondent's theory it is a wholly useless proceeding, because he claims since interstate commerce was asserted, that ends the Commissioner's jurisdiction, and not only is his award void, but any judgment affirming it, on appeal is void and can be wholly ignored.

The necessary result of respondent's line of reasoning is that a man asserting a cause of action under the Iowa Workmen's Compensation Act is deprived of any remedy and any hearing because of a mere assertion of a Federal right as defense by his opponent. It should be unnecessary to argue that this is not the law.

Counsel quotes the remark of Mr. Justice Butler, in *Kansas City Structural Steel Co. v. Arkansas*, 46 Sup. Ct. Rep. 59, —— U. S. ——, decided November 16, 1925:

> "But this court will determine for itself whether what was done by plaintiff in error was interstate commerce."

The correctness of this proposition is of course not open to question, but what it has to do with this case is not apparent. Interstate commerce is a Federal question, and a state decision on what constitutes interstate commerce is not binding upon this court, *when the question comes before this*

court for direct review. The case cited came up on a writ of error from the Supreme Court of Arkansas. The court of course never intended to overturn the well established doctrine of res judicata or by the remark "will determine for itself" to hold that it would ignore collaterally a judgment of a state court which was not before it by direct appeal.

The very cases cited by respondent, *New York Central Railroad Company v. Winfield*, 244 U. S. 147, and *Erie Railroad Company v. Winfield*, 244 U. S. 170, show clearly that respondent's contention is incorrect. In both cases the Compensation Commission awarded compensation as against an assertion that the man was engaged in interstate commerce. While these awards were set aside by this Court, it was in each case upon direct review by writ of error, and because the assertion of interstate commerce was true and not by ignoring the state judgments collaterally, and not because of the mere assertion of interstate commerce.

C.

Identity of Parties.

Counsel relies on the four cases of

Brown v. Fletcher, 210 U. S. 82;
Ingersoll v. Coram, 211 U. S. 335;
Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, and
Dennison v. Payne, 293 Fed. 333.

The first three are clearly not in point.

Brown v. Fletcher, Held that an executor appointed in one state was not in privity with an administrator appointed in another. The reason for the holding is outlined in the decision of the Supreme Court of Massachusetts in *Low v. Bartlett*, 8 Allen, 259, as follows:

> "If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. *The executor derives his authority from the letters testamentary issued by the probate court here;* he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with the statutes of this commonwealth. *The administrator derives his authority from the probate court in Vermont*, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor *does not extend to the property there, nor to the doings of the administrator*. Nor does the authority of the administrator *extend to the property here, or to the doings of the executor.*"

The Massachusetts case is quoted and cited with approval in *Brown v. Fletcher*.

In other words a judgment against a trustee of one trust is not res judicata against another trustee of a wholly different and distinct trust, even though the ultimate beneficiaries of both trusts are the same. There is clearly no privity between such

two trustees, as neither represents the other, and the subject matter of each trust is separate and distinct. The only connection between the two trusts is that the subject matter of each was formerly owned by the same person, to-wit: the decedent prior to his death. This of course does not constitute privity.

This same rule was applied in *Ingersoll v. Coram*, holding that there was no privity between the Montana representative and one appointed by the Massachusetts court. Here again was involved the question of privity between trustees of two separate and distinct trusts, having separate and distinct subject matters.

In *Troxell v. Delaware, L. & W. R. Co.*, in so far as this court spoke on the subject of identity of parties, it was dealing with the same question, to-wit: the question of privity between two separate trustees, of two separate trusts, namely, the trustee for bringing suit under the Federal Employers' Liability Act, the administrator, and the trustee for bringing suit under the Pennsylvania act, the widow. The *Troxell* case did not involve the question of privity between a trust and a cestui que trust, even though Mrs. Troxell was an ultimate beneficiary of each trust, because in the first action, she was suing as trustee under the Pennsylvania act.

The question of privity between a trustee and a cestui que trust, is determined by the case of *Corcoran v. Chesapeake & O. Ry.* (94 U. S. 741)

cited in our original brief.

It is, however, apparent that the Troxell case was decided on the familiar doctrine announced by Mr. Justice Brandes, in *Southern Pacific v. Bogart*, 250 U. S. 483 (490).

> "Nor (is there) any reason why the minority who failed in the attempt to recover on one theory because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis."

or as stated by the Circuit Court of Appeals of the Eighth Circuit, in *Wheeling & L. E. R. Co. v. Carpenter*, 264 Fed. 772 (776):

> "It is fundamental that one is not estopped from pursuing a remedy that he is entitled to merely because of his endeavor to avail himself of a remedy that he was never entitled to."

See also cases cited on page 442, of the Troxell case.

Concededly *Dennison v. Payne* does support respondent, but it is submitted that the conclusion reached is erroneous for the same reason that the decision below is. The *Dennison* case is certainly not with the weight of authority—in fact, it is the only decision that our search has revealed which holds that there is no privity between trustee and cestui que trust. It is not supported by the *Brown*, *Coram* or *Troxell* decisions, because as indicated, they do not involve that point, but involve only the question of privity between two separate trustees. It is contrary to the *Corcoran* decision, and to every other decision of which we are aware.

D.

Equitable Estoppel and Election.

Respondent devotes certain portions of his brief to the above subject. We have never asserted, and do not now assert any claim based on either doctrine.

The foregoing applies in part to the companion case of Chicago, Rock Island & Pacific Railway Company v. Fred A. Elder, October Term, 1925, No. 684, although no separate reply brief is filed in that case.

The judgment below should be reversed.

Respectfully submitted,

M. L. Bell,
New York, New York,
W. F. Dickinson,
Daniel Taylor,
Chicago, Illinois,
Thomas D. O'Brien,
Alexander E. Horn,
Edward S. Stringer,
St. Paul, Minnesota,
Counsel for Petitioner.

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B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in Schendel v. Chicago, R. I. & P. Ry. Co. 204 N. W. 552. It is not yet reported in the official Minnesota Reports.

C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (Record 231.)

2. The specific claims advanced and rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota, that a certain judgment of the District Court of Lucas County, Iowa, was res judicata, and a bar to plaintiff's cause of action, under the full faith and credit clause of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District Court of Steele County, Minnesota, and by the Supreme Court of Minnesota against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 163, 72, 73, 75, 76, 188, 189, 191, 193-197, 210-228.)

3. The jurisdiction of this court is invoked in this cause, under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, "An act to amend the Judicial Code, and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is sustained by the following:

Forsyth v. Hammond, 166 U. S. 506,

Subsection (a), Section 5, Rule 35, of Revised Rules, effective July 1, 1925.

D.

STATEMENT OF THE CASE.

This case, and its companion case, *Chicago, R. I. & P. Ry. Co.,* Petitioner, v. *Fred A. Elder,* Respondent, in which case an application for a writ of certiorari is likewise filed in this court, grew out of the same accident. The two cases, while differing in some respects, have many points in common. The two cases should be considered together.

Decedent was killed in a wreck near Pershing, Iowa (within the state of Iowa), on February 4, 1923. Negligence is conceded. The question at issue was whether decedent was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or in intrastate commerce, so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 91-140.) A summary of its provisions is found in *Hunter v. Colfax Consolidated Coal Co.,* 175 Ia. 245, 154 N. W. 1037, and in *Hawkins v. Bleakly,* 243 U. S. 210, and in the opinion of the court below (R. 220). Petitioner contends that a certain unreversed and final judgment entered in the District Court of Lucas County, Iowa, on June 2, 1923, conclusively determined the commerce to be intrastate. This judgment reads as follows:

> "The court further finds * * * that the said Clarence Y. Hope was not at the time of his death engaged in interstate commerce, and that Mrs. Clarence Y. Hope as the sur-

> viving widow of the said decedent is entitled to an award of compensation under the Iowa Workmen's Compensation Law * * *." (R. 163.)

Eliminating entirely for the present this Iowa judgment, and viewing the facts as shown by the record most favorably to plaintiff, at most it made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, and still contends, that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law. But for the purpose of argument only, we will concede an issue of fact.

Petitioner contends that under the full faith and credit clause of the Constitution of the United States, this judgment concluded the entire matter, and the denial of petitioner's claim in this respect constitutes the basis of this court's jurisdiction.

Plaintiff (respondent) began an action under the Federal Employers' Liability Act, in the District Court of Steele County, Minnesota, on February 21, 1923 (R. 2). On March 2, 1923, petitioner began a proceeding before the Industrial Commissioner of Iowa, under and pursuant to the Iowa Workmen's Compensation Act (R. 143). Under the Iowa act, the adverse party is the widow, and Mrs. Hope was duly made a party to the proceeding. She was likewise the sole beneficiary under the Federal Employers' Liability Act, if there had been any cause of action under that act (R. 72, fols. 214, 215). She answered asserting that the

deceased was engaged in interstate commerce and hence that the Iowa Compensation Act was without application (R. 144). The arbitration committee provided for by the Iowa Compensation Act found that the deceased was engaged in intrastate commerce (R. 147). Mrs. Hope filed an application in review, and the Industrial Commissioner affirmed the arbitration committee, and determined that deceased was engaged in intrastate commerce (R. 150). Mrs. Hope appealed from that decision to the District Court of Lucas County, Iowa (R. 158), and that court, on June 2, 1923, entered the judgment just mentioned, affirming the Industrial Commissioner, and adjudging specifically that the deceased was engaged in intrastate commerce (R. 162-164).

In the action in the Steele County District Court, the judgment of the District Court of Lucas County was pleaded as res adjudicata, and as a bar under the full faith and credit clause of the United States Constitution (R. 11-17). The action was tried on March 4, 1924, resulting in a verdict for the plaintiff, and necessarily a finding by the jury that the decedent was engaged in interstate commerce, which was the only question submitted to it (R. 18, 77-85, 187).

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified under the Federal Constitution (R. 72, 73, 147-166). Upon objection, it was excluded by the court generally, although permitted in evidence for the purpose of a motion by

petitioner for a directed verdict (R. 73, 74). Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment (R. 75, 76), and denied by the court (R. 76). After the verdict, the court denied a motion for judgment notwithstanding the verdict, or for a new trial on the same ground (R. 188-192, 193-197). From a judgment entered on the verdict (R. 198), petitioner appealed to the Supreme Court of Minnesota (R. 200), urging the same ground of reversal (R. 205-207). The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court (R. 210 to 228), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court (R. 231).

The Federal question, the denial of petitioner's right under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Second supplemental answer (R. 15).

2. Offer of the Iowa judgment in evidence (R. 72, 73).

3. Motion for a directed verdict (R. 75, 76).

4. Motion for judgment notwithstanding the verdict or a new trial, (R. 188-192, particularly folios 565, 566 and 572).

5. In the Supreme Court upon appeal from the judgment (R. 205-207).

E.

ASSIGNMENTS OF ERROR.

The Supreme Court of the State of Minnesota erred:

1. In refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1, of Article IV, of the Constitution of the United States.

2. In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1, of Article IV, of the Constitution of the United States.

3. In entering judgment affirming the District Court of Steele County, Minnesota, in:

a. Refusing to receive in evidence the exemplified copy of the Iowa judgment.

b. Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

c. Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it, because of said Iowa judgment.

d. Refusing to grant a new trial because of said Iowa judgment.

e. Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

F.

ARGUMENT.

The Supreme Court of Minnesota in its opinion holds that the judgment of the District Court of Lucas County, Iowa, was not entitled to full faith and credit under the Federal Constitution, because:

I.

The Iowa judgment was not binding for the reason that:

> "Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act." (R. 224.)

II.

There was no identity of parties in the two actions the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the Federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such sole beneficiary for the purpose of suit). (R. 225-227.)

I.

Binding Effect of the Iowa Judgment.

The court's reasoning is

(a) Manifestly wrong; but

(b) Even if right, as an abstract proposition of law, does not support the conclusion reached because it only involves the correctness of the Iowa court's decision and not its jurisdiction.

(a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judgment of a tribunal of competent jurisdiction, it cannot be litigated in another action.

Southern Pacific Ry. v. United States, 168 U. S. 1.

While possibly the Iowa judgment is not res adjudicata in its broad sense in this action, it is certainly an estoppel by verdict in that it squarely determined the character of the commerce, and that determination is conclusive in this action.

Sheets v. Ramer, 125 Minn. 98, 145 N. W. 787.
Meyers v. International Co., 263 U. S. 64.
Cromwell v. Sac County, 94 U. S. 351.

As we read the opinion of the court below, it recognizes this rule, but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was

immediately divested of its right to determine whether there was a cause of action under its own laws. A moment's reflection will clearly demonstrate the fallacy of the court's reasoning.

Absolutely no authority is cited to support the court's conclusion. THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT, HOLD CONTRARY TO THE CONCLUSION REACHED BELOW. *Williams v Southern Pacific,* 202 Pac. 356, 54 Cal. App. 571 (certiorari denied, 258 U. S. 622), holds squarely that such a judgment in a compensation proceeding is conclusive in an action brought under the Federal act. It is absolutely impossible to distinguish the Williams case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of *Dennison v. Payne,* 293 Fed. 333 (Circuit Court of Appeals, of the Second Circuit), while differing with the California court in the Williams case on the question of identity of parties, holds squarely that where there is identity of parties, the judgment in the compensation case is binding in the action under the Federal act.

There are involved two sovereign powers, the State of Iowa, and the United States. Each is supreme in its own sphere, the State as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation, regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law, except as may be necessary for the protection of interstate commerce.

First Employers' Liability Cases, 207 U. S. 463.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation, add to or subtract from any substantive right given by Congress. In that field, the Federal law is supreme.

Seaboard Air Line v. Horton, 233 U. S. 492.
Erie Ry. v. Winfield, 244 U. S. 170.
N. Y. Central Ry. v. Winfield, 244 U. S. 147,
N. Y. Central Ry. v. Tonsellito, 244 U. S. 360.

The state of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce, and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. He has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

The United States has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, in effect it has done so by utilizing the courts of the state and Federal government already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction, it must find the jurisdictional facts. It

necessarily has authority to determine whether it has jurisdiction. The Iowa tribunal therefore has jurisdiction to determine whether the commerce is interstate or intrastate. A finding of interstate commerce ousts it of jurisdiction.

Conversely (as to Iowa accidents), the tribunals for enforcing the Federal act likewise have authority to determine whether they have jurisdiction, and consequently authority to determine the character of the commerce. A finding of intrastate commerce ousts them of jurisdiction.

We have therefore, a situation where both tribunals have authority to determine the facts upon which their respective jurisdictions depend. The first final judgment entered, no matter in which tribunal, determines the matter for all times. It makes no difference which proceeding or action was started first. It is not the final judgment in the first suit that governs, but the first final judgment, although it may be in the second suit.

Boatman's Bank v. Fritzlen, 135 Fed. 650.
Allis v. Davidson, 23 Minn. 442.
Insurance Co. v. Harris, 97 U. S. 331.
Schuler v. Israel, 120 U. S. 506.

See also the authorities cited in
Williams v. Southern Pacific Ry. 202 Pac. 356, 54 Cal. App. 571.

Had the court below determined that the deceased was engaged in interstate commerce before the Iowa court found to the contrary, that finding,

until set aside, would have been binding on the Iowa tribunal in any proceeding brought under the Iowa Compensation Act.

Jackson v. Industrial Board, 280 Ill. 526, 117 N. E. 705.

Since however the Iowa tribunal determined the character of the commerce to be intrastate before the question came up for determination in Minnesota, the Iowa judgment was conclusive upon the Minnesota courts.

The court below ignored the Iowa judgment because the jury below disagreed with the Iowa court on an issue of fact. The court below takes the position that since interstate commerce was asserted, the court in which it was asserted was the only tribunal that could determine whether it existed. Stating it another way, it held that the Iowa court could not determine its own jurisdiction. Merely to state the proposition is to demonstrate its unsoundness.

(b)

Even if, as an abstract proposition, the conclusion of the court below is sound, it does not involve the jurisdiction of the Iowa court, but only the correctness of that court's decision.

The court below holds that a party who has commenced an action claiming under the Federal act, *cannot be required* to litigate the interstate commerce question before the Industrial Commissioner. The barrier which the court below does not

attempt to, and of course could not get over, is that the Iowa court in this particular case determined that he *could be required* to do exactly this.

If the court below is right, it merely means that the Iowa court was wrong in the conclusion it had reached. If the Iowa court was wrong, the way to correct the error was to appeal and not by a collateral attack upon its judgment.

Thus in *23 Cyc, 1088*, it is stated:

> "Where the court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, *the finding is conclusive and cannot be controverted in a collateral proceeding.*"

See also *34 Corpus Juris 552* and cases cited.

In *Taylor vs. Robert Ramsey Co.*, 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

Southern Pac. Co. vs. Jensen, 244 U. S. 205.

Therefore though the Industrial Commission was clearly wrong, nevertheless it was held that the award under the compensation act was valid.

The only way to correct an error in the conclusion of the Iowa court having jurisdiction, is by direct appeal.

Toy Toy vs. Hopkins, 212 U. S. 542,

where this court held (syllabus):

> "Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus* proceedings."

Likewise in the case of *Dowell vs. Applegate*, 152 U. S. 327, this court said, on page 340:

> "These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determniation of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*"

II.

Identity of Parties.

In addition to the rule already referred to, that a judgment is binding upon the parties to an action, there is the further rule that a judgment is also binding upon those in privity with the parties. The question presented is:

Is there such privity between Mrs. Hope and the plaintiff (the administrator) that a judgment to which Mrs. Hope is a party, binds the administrator? The court below held that there was no such privity.

The case of *Williams vs. Southern Pacific Ry.* 202 Pac. 356, 54 Cal. App. 571, to which reference has been made, on exactly identical facts, holds that there was privity and that the administrator was bound. Nothing could be added to the reasoning in that case. The Circuit Court of Appeals, in *Dennison vs. Payne*, 293 Fed. 333, reached an opposite conclusion. With all respect for that tribunal, it is submitted that the decision is poorly reasoned, and not in accord with the decisions of this court.

By the judgment of the District Court of Iowa, it was adjudged that Hope was engaged in intrastate commerce. Jessie Hope, the widow, was a party to that action. In this action it was contended by plaintiff and decided by the court below, that Hope was engaged in interstate commerce. This action is brought by the administra-

tor under the Federal Employers' Liability Act, which provides that the action may be maintained by the personal representative "for the benefit of the surviving widow." In this case the widow is the sole beneficiary and is entitled to any recovery in this action. There are no dependent children, it being stipulated upon the trial that the step-children mentioned in the complaint were not entitled in fact to any recovery in this action (R. 72).

Neither the representative, the plaintiff in this action, nor the estate, has any interest in the cause of action or the recovery. This, as indicated, belongs solely to the widow, the representative being merely the trustee for the purpose of bringing suit.

Gulf Ry. Co. vs. McGinnis, 228 U. S. 173.

In the Iowa action, Mrs. Hope was the real party in interest as well as the nominal party; in the Minnesota action she is the real party in interest, but not the nominal party.

The view of this court on the question of a privity existing between the widow as beneficiary, and the administrator is clearly shown by the case of *M. K. & T. Ry. Co. vs. Wulf,* 226 U. S. 570. A widow brought the suit, alleging a cause of action under the Federal Employers' Liability Act. Of course under that act she had no authority to sue. In the meantime, the statute of limitations ran. An application was then made to substitute the administrator as plaintiff. This was permitted, this court holding that no new cause of action was introduced in the case, saying:

> "Nor do we think it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Section 6, of the Employer's Liability Act. *The change was in form rather than in substance.*"

In the case of *Lathrop vs. Schutte,* 61 Minn. 196, 63 N. W. 493, the court in speaking of an action brought by the father under the statute, for injuries to the minor child, said:

> "Whatever is recovered, if anything, belongs to the child, and the father holds it in trust for him. * * * The judgment in this action by the parent *is a bar to any subsequent action for the same cause prosecuted by the minor, by his guardian, general or ad litem, or by himself, when he reaches majority.*"

In the case of *Bamka vs. Omaha Ry.,* 61 Minn. 549, 63 N. W. 1116, the court said:

> "For in an action brought by a person as an administrator or as a guardian, general or special, *he is not a party properly speaking, although he is nominally. The real party is the estate he may represent as administrator or the minor in whose behalf he, as guardian, prosecutes the action.*"

In *Telford vs. McGillis,* 130 Minn. 397, 153 N. W. 758, the court said:

> "It does not matter that intervenor was not a formal party to this action. *It was brought in the name of his representative, and this concludes him.*"

In *Corcoran vs. Chesapeake & Ohio Ry.*, 94 U. S. 741, Corcoran was trustee for the bondholders. As such trustee he brought suit, but was defeated. Later he brought a second suit as a bondholder. It was held that the judgment against him as trustee bound him individually because, as trustee, he represented himself individually.

In the case of *In Re Bell (Cal.)*, 95 Pac. 372, the court said:

> "A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, *she being, in both proceedings, the real party in interest,* asserting individual and not representative rights."

In the case of *In re Parks*, 166 Ia. 403, 147 N. W. 850, the court said:

> "It may be conceded that theoretically the former suit against Mrs. Parks individually was not against the same defendant as is the present suit against her as administratrix of an estate. Under the facts of this case, however, *such theoretical distinction loses its application and is without practical value to the appellant.* * * * If there were any persons beneficially interested in such an estate other than herself individually, a somewhat different question would be presented. But there are none. * * * Mrs. Parks, as administratrix, therefore, is representative of no

other beneficiary than herself as sole heir of the decedent."

In the case of *Chandler vs. White Oak Creek Lumber Co. (Tenn.)*, 173 S. W. 449, Chandler held certain land as trustee for himself and others. Suit was brought against him individually (not as trustee), and against all other beneficiaries of the trust, to quiet title. Judgment was obtained. Later, as trustee, he brought suit to recover possession of this land. It was held that he, as trustee, was estopped by this judgment against the beneficiaries of the trust. This is exactly the situation here.

In *23 Cyc.* page 1245, the rule is stated as follows:

> "Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."

In support of this rule (see Note 32), there are cited cases from the Supreme Courts of sixteen states, as well as the courts of the United States and Canada.

See also 34 *Corpus Juris* 999 and cases cited.

In *Black on Judgments, 2nd Edition, Section 538*, it is stated:

"Where a suit is prosecuted by one person for the use of another, the latter being the equitable owner of the claim and the real party in interest, a judgment will bar a second suit by the latter."

In *Jackson vs. Industrial Board,* 280 Ill. 526, 117 N. E. 705, the court said:

"It is argued by the plaintiff in error that *notwithstanding the fact that the Circuit Court by its judgment on the demurrer determined that the deceased was not engaged in interstate commerce,* and for that reason gave judgment on demurrer, the judgment of the court in that case does not estop plaintiff in error to contend in this proceeding that the deceased was in fact engaged in interstate commerce. *The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit, i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error as well as the administratrix from contending in any other suit between the same parties that the deceased was injured while employed by plaintiff in error, in interstate commerce."*

See also

Grant vs. Winona Ry., 85 Minn. 422, 89 N. W. 60.

Connelly vs. Connelly, 26 Minn. 350.

Parsons vs. Urie, 104 Md. 238, 64 Atl. 927.

Rowell vs. Smith, 123 Wis. 510, 102 N. W. 1.

Black on Judgments, 2nd Ed., Sec. 537.

The *Dennison* case cites *Troxel vs. Delaware & Lackawanna Ry.*, 227 U. S. 434, as an authority that the Iowa judgment is not binding on the plaintiff, entirely ignoring the *Williams* case. The *Williams* case so clearly distinguishes the *Troxel* case as to leave nothing more to be said.

There is certainly nothing in the opinion in the *Troxel* case which suggests that this court intended to depart from the well established doctrine announced in the *Corcoran* case (94 U. S. 741) already referred to, where this court held that a trustee and a cestui que trust were in privity, and said:

> "It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the decree against his trustee *in the very matter of the trust for which he was appointed.*"

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. A writ of certiorari should be granted to correct its judgment.

Respectfully submitted,

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